Filed 8/23/10 Cummings v. State of California CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DANA CUMMINGS et al., Plaintiff and Respondent, v. STATE OF CALIFORNIA, Defendant and Appellant.	2d Civil No. B217006 (Super. Ct. No. 01129903) (Santa Barbara County)

The State of California appeals from an order granting a new trial to respondent Dana Cummings, individually and as guardian ad litem for Derek Cummings, Mariah Cummings and Benjamin Cummings (Cummings) in this action for dangerous condition of a State highway. The State contends that there was no evidence of juror misconduct to support the order granting new trial and, even if there had been juror misconduct, it could not be prejudicial because the State was immune from liability. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On a summer morning in 2002, Dana Cummings rear-ended the car of Brooke Bartholomay in the fast lane of Highway 101 at Gaviota Beach Road. Bartholomay had slowed to make a U-turn at a break in the median where Gaviota Beach Road intersects 101. Cummings was driving behind Bartholomay with his three children in his Volkswagon bus, and another vehicle was between them. When Bartholomay

slowed, the other vehicle changed lanes and Cummings' van hit Bartholomay's car. There were no pre-impact skid marks. Cummings testified that he was looking out his side window just before the accident to check the next lane, and when he looked ahead it was too late to avoid Bartholomay's car. He was severely injured in the accident, and his children suffered soft tissue injuries.

Cummings sued Bartholomay, Volkswagon, the State of California, and Granite Construction. By the time of trial, only his claims against the State of California were unresolved.[1] Cummings based his State liability claim on highway construction two miles away, and the State's decision not to sign a detour route for drivers such as Bartholomay who were diverted by the construction.

Two miles north of the accident site, the State had been repaving the interchange between State Route 1 (SR 1) and Highway 101 (101). Bartholomay lived near SR 1 and she normally used the northbound 101 to travel to her job in Santa Ynez. On the morning of the accident, Bartholomay was diverted south because the northbound interchange was closed for repaving. She drove south on 101 until she reached the first available turnaround point which was the Gaviota crossover. She had used the same crossover the day before without incident.

The undisputed evidence at trial was that a U-turn at the Gaviota intersection was legal if performed safely, and that there had not been any similar accidents at the Gaviota crossover in the nine recorded years before the accident, or since. During the years of record, about 25,000 drivers a day passed through the accident site. The closure added at most 200 per day.

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[1] The trial court granted Granite Construction's motion for summary judgment, which we affirmed. (*Cummings v. Granite Construction Company* (Jun. 19, 2007, B191062) [nonpub.opn.].)

The State moved for summary judgment based on design immunity and traffic sign immunity. (Gov. Code,[2] §§ 830.4, 830.6, 830.8)[3] The trial court denied the motion and a 13-day jury trial followed.

At trial, Harry J. Kreuper, Jr., P.E. offered his opinion on behalf of Cummings that the State was required to use traffic signs or signals to provide a safe detour route to diverted drivers. He believed the State should have directed drivers not to use the Gaviota crossover to turn around and that it should have directed the drivers to turn around at the Mariposa overcrossing, further south. This, he believed, should have been accomplished with detour signs that would mark the safe course or with changeable message signs identifying the route, and a temporary no U-turn sign at the Gaviota crossover during closures. He relied on Vehicle Code section 21363, which provides, "Detour signs shall be erected at the nearest point of detour from that portion of a highway, or from any bridge, which is closed to traffic while under construction or repair." He also relied on provisions of a Traffic Management Plan prepared by the State which, if implemented, would have provided changeable message signs at SR 1 with detour information. Finally, he relied on provisions of the CalTrans Traffic Control Manual including one that states, "Detours should be signed clearly over their entire length so that motorists can easily determine how to return to the original roadway." Vehicle Code sections and traffic manual excerpts were received in evidence.

Employees of the State testified that they do mark detours with signs when they decide to construct a detour route, but in this case, after an extensive review process, they decided not to construct a detour route. Instead, they decided to direct diverted drivers to turn around wherever they determined it was safe to do so. An e-mail from a State employee, Kim Romano, acknowledged that locals were likely to use the crossovers to turn around and stated that she believed it was not necessary to post detour signs if changeable message signs were used to provide detour information.

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[2] All statutory references are to the Government Code unless otherwise stated.

[3] "A condition is not dangerous . . . merely because of the failure to provide regulatory traffic control signs . . . ." (§ 830.4.)

At the close of plaintiffs' evidence, the State moved for judgment in its favor based on the ground that it was absolutely immune from liability for any failure to provide regulatory signs (such as no U-turn signs) and conditionally immune from liability for any failure to provide warning signs and other devices (such as detour signs) pursuant to sections 830.4 and 830.8. (Code Civ. Proc., § 631.8.) The trial court denied the motion, stating that "[t]he fact of the matter is that the State completely ignored its obligation to post safe detour signs to guide the public, and assumed that people familiar with the area would use a dangerous crossover at the Gaviota State Beach to effect a U-turn. Mr. Cresswell's testimony supports that. The e-mails support that. They left the motoring public to its own devices in contravention to established California law."

The court gave the standard instruction on dangerous condition of property pursuant to sections 830 and 835. The court also gave standard instructions on the absolute and conditional immunities for regulatory and other traffic signs. (§§ 830.4, 830.8.) With respect to absolute immunity for lack of regulatory signs, the court instructed the jury according to section 830.4: "You may not find that defendant's property was in a dangerous condition just because it did not provide a no U-turn sign at the Gaviota Beach crossroad. However, you may consider the lack of a no U-turn sign, along with other circumstances shown by the evidence, in determining whether defendant's property was dangerous." With respect to conditional immunity for lack of warning and other traffic signs, the court instructed the jury according to section 830.8: "A public entity is not responsible for harm caused by the lack of detour route signs unless a reasonably careful person would not notice or anticipate a dangerous condition of property without them."

Cummings argued to the jury that a dangerous condition arose, not from mere failure to post a no U-turn sign or detour signs, but from a combination of the two. He argued to the jury, "Now, it's not enough to say that Gaviota Beach Road is dangerous. We're not saying that. We're not implying that it needed a no U-turn sign. It was the combination, this--they had a project in mind, they had foreseen the dangers that --of not having signed the detour. And so the question is when the two came together,

that [the] closure and no U-turn sign, was that a dangerous condition. I would hope that you would answer yes."

The jury returned a 9-3 special verdict in which it answered "no" to the first question: "Was a dangerous condition created by the State's closure of the transition from State Route 1 to U.S. 101 North and diversion of traffic south on U.S. 101 towards Gaviota State Beach Road as of [the date of the accident]?"

After the court entered judgment on the verdict, Cummings brought a motion for new trial based on juror misconduct. The motion was accompanied by affidavits of the three dissenting jurors. The trial court granted the motion and provided a written statement of its reasons in which it stated that three acts of juror misconduct improperly influenced the outcome of the trial. (Code Civ. Proc., § 657.)

The trial court found that Juror No. 11 committed misconduct by considering material outside the record when he declared that he knew from his own travels that the interchange from Highway 1 to Highway 101 was a "ramp" and not a "bridge." Each juror affidavit reported that he had made this statement. The court concluded that this statement was beyond the evidence and was material because "the State is required to post detour signs for bridge closures such as this one," and "[t]here was no dispute between the parties that the interchange in question was a bridge."

The trial court found that Juror No. 2 committed misconduct by expressing an opinion based on professional expertise beyond the evidence presented when she argued that "the State must have followed up on the Kim Romano e-mail regarding message signs because the State has proper handling processes that must have been followed." According to the juror affidavits, Juror No. 2 said, "From my experience, I know they must have responded and handled the matter properly," "I know there must have been a response" and "the State went through the process correctly, so the concerns must have been dealt with." One juror reported that Juror No. 2 denied relying on her professional experience.

The trial court also found that Juror No. 7 committed misconduct because he unintentionally concealed a bias against the plaintiff. The court found that this juror

"stated in deliberations, 'I don't know why they chose me. I am biased against anyone who is taking the State's dollars.'" One juror affidavit attributed this statement to him. Another reported that he said, "he could not believe that they kept him on the jury because he told everyone from the beginning that he could not vote to make the State pay money since it would be coming out of his pocket."

DISCUSSION

Standard of Review

A trial court has broad discretion to grant a motion for a new trial based on juror misconduct proved by affidavit. (Code Civ. Proc, § 657.) The court may consider juror affidavits to establish statements and conduct of jurors, but not to prove the impact of those statements on events or the mental processes by which the verdict was reached. (Evid. Code, § 1150.) No new trial may be granted absent a miscarriage of justice. (Cal. Const., art. VI, § 13.)

We review a trial court's order granting a new trial under the deferential abuse of discretion standard, making all presumptions in favor of the order and upholding it absent a manifest and unmistakable abuse of discretion. (*Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121.) "So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside." (*Ibid.*) Because the trial court, ruling on a new trial motion, sits as an independent trier of fact, we accord to its factual determinations the same deference that we would ordinarily accord to a jury. (*Lane v. Hughes Aircraft Co*. (2000) 22 Cal.4th 405, 412.) Even under this deferential standard of review, this order granting new trial cannot stand because there is no evidence in the record of juror misconduct or miscarriage of justice.

Juror Misconduct

Juror No. 7 was biased against plaintiffs who sue the State, but the record conclusively demonstrates that he disclosed his bias during voir dire. When another prospective juror told counsel that it was not right for the taxpayers to have to pay a verdict, Juror No. 7 nodded his head. Plaintiff's counsel noticed this and asked Juror

No. 7 whether he was comfortable with the notion that the outcome should be the same as it would be if a private citizen or a rich corporation were paying the bill. Juror No. 7 said that he was not: "It's just uncomfortable, because . . . as a resident of the State of California, it feels like I'm getting sued personally, because ultimately it's my taxpayer dollars that, if there was a civil judgment would come out of that." Plaintiffs did not challenge Juror No. 7. Plaintiff's decision not to challenge the juror waived his right to raise the point after the verdict. (*George F. Hillenbrand v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 821-822 [competency issue waived where juror disclosed felony conviction in voir dire.] His disclosed bias cannot support the court's finding of juror misconduct here.

Juror No. 2 may have said that she believed the State would have followed up on an email, based on her experience, but there is no evidence that she impermissibly relied on specialized knowledge. It is juror misconduct to discuss an opinion explicitly based on specialized information from outside sources, but jurors' views of the evidence are necessarily informed by their life experiences including their educational and professional work. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 649.) We cannot demand that jurors never refer to their background during deliberations. (*People v. Steele* (2002) 27 Cal.4th 1230, 1266.) Juror No. 2 had no experience with the State, and she disclosed her experience as a City planner on voir dire. Her statement was supported by the testimony of a State engineer about the State's extensive review and approval process and conveyed no more than the presumption that official duties have been regularly performed. (Evid. Code, § 664.)

Juror No. 11 may have said that the closure was a ramp and not a bridge, but the distinction was legally irrelevant and was not beyond the evidence presented at trial. Jurors were provided with an aerial photograph and extensive testimony and diagrams from which they could determine for themselves the nature of the closure. Whether it was a ramp or a bridge made no legal difference to application of Vehicle Code section 21363, which was in evidence and applies by its terms to both "bridge[s]" and any "portion of a highway." Any distinction between bridges and ramps would not

have been proper. A ramp is a portion of a highway, which the Vehicle Code defines as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel" (Veh. Code, § 360), and the Streets and Highway Code defines it to include "all works incidental to highway construction, improvement, and maintenance" (Sts. & Hy., § 23). The witnesses at trial used both "bridge" and "ramp" to describe the closure, and plaintiff's own expert made no distinction. He testified that Vehicle Code section 21363 applied to the closure whether it was "a bridge or any routing change."[4]

Even if there had been some evidence of misconduct, we could not overlook the fact that the State was immune from liability here as a matter of law, and that no miscarriage of justice could have resulted from the defense verdict. "In reviewing the trial court's ruling on a new trial motion, we accept the trial court's credibility determinations if they are supported by substantial evidence, including all favorable inferences that may be drawn from the evidence. Whether prejudice arose is a mixed question of law and fact subject to our independent review." (*Karlsson v. Ford Motor Co*. (2006) 140 Cal.App.4th 1202, 1232.)

Plaintiff's counsel persuaded the trial court that the State had a duty to provide a signed detour that would direct motorists how to make their way back to 101 northbound, and that it could be held liable for a dangerous condition resulting from the combination of the lack of a signed detour and the lack of a no U-turn sign at the Gaviota crossover. The State had no such duty and was immune from any such liability.

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[4] At the hearing on the motion for new trial, the trial court stated that jurors "clearly violated the rules of engagement for the decision-making power of the jury," and said, "the material fact of whether--whether a bridge is involved speaks to the responsibilities of the State to avoid a dangerous condition. There are affirmative obligations on the State to detour bridge closures." The court emphasized that "[f]or [Juror No. 11] to decide it's not a bridge it's a ramp when there was no dispute that was a bridge, and that there were code of regulations that applied directly to a bridge closure. They kind of bypassed the big ticket."

If the State constructs a detour on any highway or bridge, it does have a duty to erect detour signs (Veh. Code, § 21363),[5] but the State's decision whether or not to construct a detour is discretionary (Sts. & Hy. Code, §§ 93, 125).[6] Here, the undisputed testimony was that the State chose not to construct a detour. Because no detour was constructed, there was no point of detour from which to post signs, and the provisions of section 21363 did not come into play.

Moreover, the State was statutorily immune from liability for failure to sign a detour route because there was no evidence that such signs were necessary to warn of a concealed trap (§ 830.8) and the State was absolutely immune from liability for failure to post a no U-turn sign. (§ 830.4.) A public entity is liable for a dangerous condition of its property only if the plaintiff establishes that the property was "in a dangerous condition"[7] at the time of the injury, that the condition created a reasonably foreseeable risk of injury, the condition proximately caused injury, and either the public entity had advance notice of the dangerous condition or the condition was created by a wrongful act or omission of one of the entity's employees. (§ 835.) A public entity has absolute immunity from liability for a dangerous condition that arises from failure to provide regulatory signs, such as a no U-turn sign. "A condition is not dangerous . . . merely because of the failure to provide regulatory traffic control signs . . . . " (§ 830.4.) A public entity has

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[5] "Detour signs shall be erected at the nearest points of detour from that portion of a highway, or from any bridge, which is closed to traffic while under construction or repair." (Veh. Code, § 21363.)

[6] "The department may construct and maintain detours as may be necessary to facilitate movement of traffic where state highways are closed or obstructed by construction or otherwise. The department may direct traffic onto any other public highway which will serve as a detour . . . ." (Sts. & Hy. Code, § 93.) "To notify the public that a state highway is closed or its use restricted, the department may: . . . (c) Post signs for the direction of traffic upon it, or to or upon any other highway or detour open to public travel." (Sts. & Hy. Code, § 125.) "May" is permissive. (Sts. & Hy. Code, § 16.)

[7] A "dangerous condition" is a condition that creates a substantial risk of injury when the property " is used with due care" in a reasonably foreseeable manner. (§ 830, subd. (a).)

conditional immunity for failure to post any other kind of traffic sign (such as detour signs), and can only be held liable if the sign was necessary to warn of an independently existing dangerous condition which is a concealed trap. (§ 830.8, *Kessler v. State* (1988) 206 Cal.App.3d 317, 322.) A concealed trap is a dangerous condition that "would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." (§ 830.8.) Section 830.8 liability does not come into play until the existence of a dangerous condition is first shown. (*Pfeifer v. San Joaquin County* (1967) 67 Cal.2d 177, 184.)

Here, plaintiff relied on the absence of a signed detour to provide a dangerous condition, but there was no evidence that the accident site constituted an independently dangerous condition or a concealed trap. All parties were aware of the existence of the Gaviota crossover. Whatever dangers were involved in making the U turn were necessarily evident, as were the dangers of traveling at an unsafe speed and distance behind another highway driver, while looking away. (Veh. Code, §§ 22350, 21703.)

DISPOSITION

The order granting Cummings' motion for new trial is reversed, and the trial court is directed to instead enter judgment in favor of the State. Costs on appeal are awarded to appellant.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Denise de Bellefeuille, Judge

Superior Court County of Santa Barbara

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